Supreme Court, U.S.
FILED
FEB 13 1992
OFFICE OF THE CLERK

No. 91-1111

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

HARTFORD FIRE INSURANCE CO., ET AL.,

Petitioners,

v.

STATE OF CALIFORNIA, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE NATIONAL CONFERENCE OF INSURANCE LEGISLATORS, AS AMICUS CURIAE SUPPORTING PETITIONERS

STEPHEN W. SCHWAB
Counsel of Record
SEYMOUR SIMON
REUBEN A. BERNICK
PETER S. LUBIN
DAVID E. MENDELSOHN
GAIL M. GOERING
RUDNICK & WOLFE
203 North LaSalle Street
Suite 1800
Chicago, Illinois 60601
(312) 368-4000

Counsel for Amicus Curiae

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

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INTEREST OF THE AMICUS CURIAE

Founded in 1969, the National Conference of Insurance Legislators ("NCOIL") is a voluntary national organization of state legislators who are involved in the development of public policy and the enactment of legislation related to insurance. One of NCOIL's purposes is stated succinctly in its Articles of Organization: to "reaffirm the traditional primacy of the states in the regulation of insurance."

With asset holdings of over $1.5 trillion, insurance is the largest private business regulated by the states. Every state legislature has a committee which deals with insurance issues, and every state has a department devoted exclusively to insurance regulation. NCOIL's members represent 35 states, including 16 of the 19 plaintiff states. Appropriations from the treasuries of each member state go toward funding NCOIL.

Pursuant to Rule 37.2 of the Rules of this Court, NCOIL respectfully submits this brief as *amicus curiae* in support of petitioners. Because NCOIL's members are extensively involved in state regulation of the business of insurance, NCOIL has a substantial interest in the outcome of this case and is able to provide an additional and broader perspective on the important issues presented. NCOIL believes that this brief will assist the Court in analyzing and resolving these issues. The parties have consented to the filing of this brief, and their written consents have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

The first priority of state insurance regulation is preserving company solvency. To this end, the states traditionally have regulated competition within the insurance industry. Following this Court's decision in *United States v. South-Eastern Underwriters Ass'n*, 332 U.S. 533 (1944) ("*SEUA*"), Congress enacted the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1945) ("McCarran"), to preserve the states' regulatory authority by, *inter alia*, exempting the business of insurance from federal antitrust scrutiny. The Ninth Circuit's decision impermissibly diminishes that authority.

By ignoring McCarran's express language, the court erred in two principal respects that are of special interest

to NCOIL and its member states. First, the court erred in holding that domestic persons engaged in the business of insurance lose their federal antitrust exemption when they act together with foreign persons.[1] Second, the court compounded its error when it held that all such persons are not protected by the state action doctrine even when they participate in state regulatory activities.

When Congress enacted McCarran, it knew that domestic insurance companies were dependent on and collaborated with foreign reinsurers to preserve their solvency. *See infra* part I. With that knowledge, Congress delegated regulation of the business of insurance to the states without reference to the domicile of those engaged in that business. By focusing on the domicile of persons engaged in the business, the Ninth Circuit's flawed analysis has threatened the efficacy of state regulation. *See infra* part II.

The court's state action ruling also erodes state regulation by deterring private persons from participating in the state decision-making process. This Court has recognized that collective activities among private enterprise and public regulators are exempt from federal antitrust liability. *See infra* part III. Disregarding that precedent, the Ninth Circuit imposed such liability upon the defendants for their involvement in state regulatory proceedings which were implemented pursuant to McCarran and actively supervised by politically accountable state officials. The court thus has infringed fundamental federalism principles.

NCOIL offers this brief because the Ninth Circuit has redrawn the lines of federal antitrust liability. The court's decision forces state officials to surrender regulatory au-

[1] This brief uses the terms "domestic" to denote U.S.-domiciled companies and "foreign" to refer to non-U.S. companies.

thority to an overburdened federal judiciary and to juries unfamiliar with the insurance industry and the means to maintain its solvency. If not reversed, the ruling effectively will jeopardize the states' power to regulate the business of insurance and protect the public. Therefore, the petition for a writ of certiorari should be granted.

ARGUMENT

I. CONGRESS ENACTED MCCARRAN TO PRESERVE STATE CONTROL OF THE BUSINESS OF INSURANCE

The states have regulated the business of insurance from the start. Pursuant to the congressional mandate expressed in McCarran, state regulation controls competition within and preserves the solvency of what has become the largest private enterprise in the United States. Congress fully understood the enormity of the task it had entrusted to the states, and has not seen fit to rescind McCarran in any respect. Although McCarran's language and legislative history are clear, the Ninth Circuit has called them into question. This is a classic case for review by the Court.

Congress' intent that the states fulfill their traditional role of regulating the business of insurance is plainly stated in McCarran:

> Congress declares that the continued regulation and taxation by the several states of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several states.

15 U.S.C. § 1011. Congress' report on the statute is equally clear:

> From its beginning the business of insurance has been regarded as a local matter, to be subject to and regulated by the laws of the several states. . . . [T]here is urgent need for an immediate expression of policy by the Congress with respect to the continued regulation of the business of insurance by the respective states.

Expressing the Intent of the Congress with Reference to the Regulation of the Business of Insurance, H.R. Rep. No. 143, 79th Cong., 1st Sess. 2 (1945).

Before any federal antitrust legislation was enacted, this Court in *Paul v. Virginia*, 75 U.S. 168 (1868), held that insurance was not interstate commerce. Enacted in 1890 and 1914, respectively, the Sherman Act and the Clayton Act (now codified at 15 U.S.C. §§ 1-36) were federal laws which applied only to persons engaged in interstate commerce. Congress obviously did not intend these statutes to apply to the business of insurance because *Paul* established that insurance was not interstate commerce. H.R. Rep. No. 143 at 2. In 1944, however, this Court in *SEUA* abandoned *Paul* and held that insurance was interstate commerce. *SEUA*, 332 U.S. at 553.

Under *SEUA*, collective activities between persons engaged in the business of insurance were subjected to federal antitrust scrutiny for the first time. Until then, insurance companies could become members of rate-making bureaus and charge uniform rates as long as the states approved their collective activity. Confronted with a practical problem, 91 Cong. Rec. 1484 (1945) (statement of Sen. Murdock), Congress enacted McCarran to preserve the *status quo ante* with one exception: persons engaged in the business of insurance could be subject to federal antitrust liability for acts or agreements of boycott, coercion or intimidation.[2] 15 U.S.C. § 1013(b); *see* Kimball & Heaney,

[2] A discussion of the boycott issues in this case is found in the Petition filed in Case No. 91-1111 at 18-25.

Emasculation of the McCarran-Ferguson Act: A Study in Judicial Activism, 1985 Utah L. Rev. 1, 9-10. In all other respects, such persons would remain exempt. The states once again would supervise and control anticompetitive activity in the business of insurance, subject to Congress' retained power to enact specific legislation relating to that business. 15 U.S.C. § 1012(b). Congress thus was not concerned that insurance companies might continue conferring about business practices because McCarran ensured that the states would continue to regulate such activity. If the states failed to be diligent in their supervision, Congress could take appropriate action.

Congress understood that the business of insurance was a global enterprise and that reinsurance was an integral part of that business. H.R. Rep. No. 143 at 2; H.R. Rep. No. 873, 78th Cong., 1st Sess. 9 (1943). In fact, Congress knew that reinsurance was vital to the solvency of domestic carriers, that reinsurance often was placed with foreign companies, and that the states could not regulate those companies' activities outside state boundaries. H.R. Rep. No. 143 at 3. With these facts before it, Congress enacted McCarran, complete with its present federal antitrust exemption.

When Congress exempted the business of insurance from federal antitrust laws, it knew that unrestrained competition in that business may cause insolvency. Carlson, *The Insurance Exemption from the Antitrust Laws*, 57 Tex. L. Rev. 1127, 1138-39 (1979). The reason for this lies in the unique nature of insurance. As Senator Ferguson explained:

> I think the insurance companies have convinced many members of the legislature that we cannot have open competition in fixing rates on insurance. There will be failures, and failures always follow losses.

> The sale of insurance is not the same as the sale of an article in a store. When one buys an article in a store, he brings it home with him. In the case of insurance, he buys a promise to pay upon the happening of a certain event, and that event may be the burning of his home. If the company is not sound and solvent at the time the house burns, or at the time claim is made, there is no insurance at all. That is what we have tried to avoid.

91 Cong. Rec. 1481 (1945). Before *SEUA*, insurers worked with one another and with regulators to control competition and preserve the financial integrity of their industry. McCarran was designed to enable the states to continue to regulate such competition.

The solvency of insurance companies is a long term state concern. Rappaport, Congressional Research Service, *CRS Report to Congress: Insurance Company Solvency* 22 (1989) (hereinafter "*Company Solvency*"). Reinsurance is essential to maintaining the solvency of primary insurers. United States General Accounting Office, *Insurance Regulation: State Reinsurance Oversight Increased, But Problems Remain* 3, 24 (1990) (hereinafter "*Insurance Regulation*"). Reinsurance performs important functions, particularly the spreading of risk. *Company Solvency*, *supra*, at 5. Reinsurers themselves reinsure with other companies, giving the industry greater capacity and stability because large losses are spread widely. *Id.* at 17.

Like primary insurance, reinsurance is regulated entirely by the states. *Insurance Regulation*, *supra*, at 2. Each state regulates domestic insurers and reinsurers within its jurisdiction, and regulates foreign reinsurers through, *inter alia*, statutory and regulatory requirements which limit the financial credit domestic insurers may show in their statutorily prescribed financial statements for reinsurance placed with those companies. *Id.* at 4. When insurance companies

become financially troubled, the state insurance departments are responsible for taking action.[3] United States General Accounting Office, *Insurance Regulation: Problems in the State Monitoring of Property/Casualty Insurer Solvency* 9 (1989) (hereinafter "*State Monitoring*").

The business of insurance and state regulation of that business have grown substantially under McCarran. Today, the insurance industry plays a critical role in the U.S. economy by virtue of its large asset holdings. *Company Solvency, supra,* at 1. The relevant statistics are astounding. The Congressional Research Service has estimated that the total asset holdings of life/health and property/casualty insurance companies at year-end 1987 was approximately $1.5 trillion. *Id.* By then, there were over 3,800 property/casualty insurance companies doing business in the United States. *State Monitoring, supra,* at 9, 40. U.S. Department of Labor Statistics reveal that in 1990, this number had grown to almost 3,900 companies, employing 623,300 persons. Insurance Information Institute, *The Fact Book: 1992 Property/Casualty Insurance Facts* 5, 13 (1992) (hereinafter "*Fact Book*"). In that year, these companies received nearly $216 billion in premiums. *Id.* at 5. By mid-year 1990, there were over 2,200 domestic life insurance companies operating in the U.S. that employed 857,500 persons (not counting 661,200 agents, brokers and

[3] *See Fabe v. United States Dept. of the Treasury*, 939 F.2d 341, 347 (6th Cir. 1991); *Hartford Casualty Ins. Co. v. Borg-Warner Corp.*, 913 F.2d 419, 426 (7th Cir. 1990); *Lac D'Amiante du Quebec v. American Home Assur.*, 864 F.2d 1033, 1041 n.9, 1045 (3d Cir. 1988); *State of Idaho ex rel. Soward v. United States*, 858 F.2d 445, 450-51 (9th Cir. 1988), *cert. denied sub nom., Fagliano v. United States*, 480 U.S. 1065 (1989); *Gordon v. United States Dept. of the Treasury*, 668 F. Supp. 483, 487 (D. Md. 1987), *aff'd*, 846 F.2d 272 (4th Cir. 1988), *cert. denied*, 488 U.S. 954.

service personnel), and received $264 billion in premiums for purchases of over $1.5 trillion of life insurance. *Id.* at 14; American Counsel of Life Insurance, *1991 Life Insurance Fact Book Update* 6, 35, 52, 54 (1991). Health insurance premiums in 1989 were $215.6 billion. *Fact Book, supra,* at 5.

The property/casualty segment of the insurance industry relies extensively on reinsurance. *Company Solvency, supra,* at 5. In 1981, the reinsurance market was estimated at $8.5 billion, of which $2.2 billion (25%) was ceded to foreign reinsurers. *Insurance Regulation, supra,* at 10, 41. By the end of 1988, these figures had grown substantially—the reinsurance market was estimated at $21.8 billion, of which $8.4 billion (38.6%) was ceded overseas. *Id.*

State regulation of the business of insurance (and reinsurance) is unparalleled. The most recently published statistics from the National Association of Insurance Commissioners ("NAIC") show the following: The fiscal year 1991 combined state budget for insurance regulation was $503 million. NAIC, *State Insurance Department Resources Report 1990* 3 (1991). The states employed 9,757 persons (including contractual employees), of whom 286 served as market conduct examiners. *Id.* at 11. They collected $6.7 billion in taxes, $641 million in fees and assessed $12.2 million in fines against the 8,480 companies operating in the U.S. *Id.* at 25, 33.

In view of these facts and Congress' clear statement of intent in McCarran, the impact of the Ninth Circuit's opinion should not be underestimated.

II. THE NINTH CIRCUIT'S "EXEMPT ENTITIES" ANALYSIS UNDERMINES STATE REGULATION OF THE BUSINESS OF INSURANCE

As demonstrated above, Congress recognized and preserved in McCarran the insurance industry's collaborative customs and practices and the states' unique role in regulating those activities. Pursuant to this congressional mandate, the states continue to refine and enforce complex regulatory schemes which preserve solvency by managing these joint activities and redressing anticompetitive behavior. The Ninth Circuit's opinion upsets the federal-state balance that McCarran was designed to protect, displacing state regulatory surveillance of the business of insurance with federal litigation. Judges and juries, not state insurance specialists, now will decide sophisticated insurance issues. If the power to regulate anticompetitive behavior in the business of insurance is to be wrested from the states, it is for Congress—not the federal courts—to do so. Only this Court may restore order to McCarran antitrust analysis.

It remains undisputed that the plaintiff states have expansive frameworks to regulate the business of insurance. *See* Appendix; *see generally* Defendants' State-by-State Appendix. Each state has statutes regulating the development of insurance policy forms, and each permits companies to consult with the Insurance Services Office ("ISO") in developing these forms. App. at 1a-4a. Each state also has an unfair insurance practices act which gives its regulators broad authority to prohibit anticompetitive activity. *Id.* at 5a-6a. The Ninth Circuit's decision, however, jeopardizes the states' ability to enforce these regulatory schemes.

In determining that the defendants were subject to federal antitrust scrutiny, the Ninth Circuit agreed with the district court that the defendants were engaged in

the "business of insurance," and found that the domestic companies were "subject to regulation by the states and therefore *prima facie immune* [from the antitrust laws]:" *In re Insurance Antitrust Litig.*, 938 F.2d 919, 928 (9th Cir. 1991), *rev'g* 723 F. Supp. 464 (N.D. Cal. 1989) (emphasis added). It then concluded, however, that the domestic companies somehow lost this immunity by engaging in the business of insurance with the co-defendant *foreign* insurance companies: "[A]n exempt *entity* forfeits antitrust exemption by acting in concert with *nonexempt parties*." *Id.*, 938 F.2d at 928 (quoting *Group Life & Health Ins. v. Royal Drug Co.*, 440 U.S. 205, 231 (1979) (emphasis added)). As demonstrated below, this focus on "exempt entities" rather than exempt conduct (*i.e.*, the business of insurance) is fundamentally flawed.

The Ninth Circuit's "exempt entities" analysis is contrary to both McCarran's express language and this Court's decisions. McCarran does not make its antitrust protection contingent on the domicile of persons engaged in the business of insurance. Indeed, § 1012(b) does not shield from antitrust scrutiny "insurance businesses" of any type, but rather the "business of insurance." 15 U.S.C. § 1012(b); *see Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 126 (1982) ("The only issue before us is whether petitioners' peer review *practices* are exempt from antitrust scrutiny as part of the 'business of insurance.' ") (emphasis added); *Royal Drug*, 440 U.S. at 220 (antitrust laws apply to the insurance industry "except as to *conduct* that is the business of insurance, regulated by state law") (emphasis added). This Court's precedent thus teaches that being an "insurance business" is not the same as being engaged in the "business of insurance". As the Court already has ruled, challenged activity which is not the business of insurance may subject the actor to federal

antitrust liability. *Pireno*, 458 U.S. at 134; *Royal Drug*, 440 U.S. at 217.[4] This rule makes sense. Because insurance companies always have acted collectively in developing rules, rates, policies and forms under state supervision, it is not surprising that McCarran's antitrust immunity attaches to conduct, *i.e.*, the "business of insurance," rather than entities. Consistent with congressional intent, this collective activity promotes efficient insurance transactions; ensures full information to the industry, state regulators and consumers; and preserves solvency. *See Carlson, supra*, at 1139.

After focusing on exempt entities rather than exempt conduct, the Ninth Circuit compounded this error by assuming that because certain *entities*—the foreign reinsurers—were not regulated by the plaintiff states, the domestic companies somehow lost McCarran's antitrust protection. The court, however, misjudged the statute's breadth. McCarran's protection is not limited to regulated "entities"—it embraces all persons engaged in regulated insurance business. When Congress adopted McCarran, it knew that states were unable to regulate the activities of insurers and reinsurers beyond their jurisdictional reach. H.R. Rep. No. 143, *supra*, at 3. It also knew that reinsurance was an integral part of the business of insurance, and that much reinsurance was placed with foreign reinsurers. *See id.*; H.R. Rep. No. 873, *supra*, at 9. With a clear view of these facts, Congress delegated to the states regulatory responsibility for an industry populated

[4] *Beltz Travel Serv., Inc. v. International Air Transp. Ass'n.*, 620 F.2d 1360 (9th Cir. 1980) does not support the Ninth Circuit's "exempt entities" theory. Unlike McCarran, the statute which provided antitrust immunity in *Beltz* (§ 414 of the Federal Aviation Act of 1958, 49 U.S.C. § 1384) granted immunity to *persons* acting pursuant to orders of the Civil Aeronautics Board, not to their conduct. Therefore, *Beltz* is inapposite.

with both domestic *and* foreign insurers and reinsurers. Little has changed since McCarran was enacted to justify the Ninth Circuit's foray into the legislative realm. Insurance companies continue to depend on reinsurers, both foreign and domestic, for their financial well-being, and the states expressly regulate and protect this relationship.[5] App. at 7a-8a.

McCarran was the product of nine months of intense deliberation, following a year of heated debate over whether insurance companies were subject to federal antitrust liability. Weller, *The McCarran-Ferguson Act's Antitrust Exemption for Insurance: Language, History and Policy*, 1978 Duke L. J. 587, 592. It is difficult to conceive why Congress would have spent so much time, effort and money enacting an antitrust exemption which would be ineffective if, as the Ninth Circuit posits, the involvement of foreign reinsurers in the business of insurance eliminates that protection for domestic insurers. The court thus has created an exception which effectively swallows McCarran's rule. Because foreign reinsurance pervades the domestic insurance market, the Ninth Circuit's "exempt/non-exempt" distinction effectively may subject all collective activity among insurers and reinsurers (and intermediaries through whom they deal) to federal antitrust scrutiny, not just acts or agreements of boycott, intimidation and coercion.

[5] Relying upon *Federal Trade Comm'n v. Travelers Health Ass'n*, 362 U.S. 293 (1960), the Ninth Circuit concluded that McCarran immunity did not attach to the foreign reinsurers, because the states do not have regulatory jurisdiction over those persons. 938 F.2d at 928. In *Travelers*, this Court held that under McCarran, Nebraska's regulation of its domiciliary Travelers' advertising *activities* in Nebraska did not immunize Travelers from Federal Trade Commission Act liability for activities conducted in Rhode Island. The Court did not hold that persons engaged in the business of insurance lose their McCarran immunity simply because a state—which otherwise has regulated the business of insurance—has no regulatory jurisdiction over those *persons*.

With one fell swoop, the court has condemned all collaboration among domestic and foreign entities, and has crippled the states' ability to regulate reinsurance relationships. Domestic companies now must do business with foreign companies at substantial risks of federal antitrust liability and insolvency. The business of insurance is exempt from the federal antitrust laws because it depends upon collaborative efforts among domestic *and* foreign entities. Competition among persons engaged in this business has been tempered to preserve their solvency. Carlson, *supra*, at 1138-39. If that very collaboration subjects those persons to federal antitrust liability—requiring them to engage in unfettered competition—their solvency and the public interest are placed in jeopardy.

The superficial appeal of the Ninth Circuit's "exempt entities" test belies its relevance to the analysis at hand. If the court were correct, insurance companies would be precluded from consulting with consumer groups, policyholders and corporate risk managers, simply because none of these *entities* are regulated directly by the states. The Ninth Circuit's ruling thus discourages meaningful participation in the insurance regulatory process by exposing collective activity between insurance companies and "non-regulated" entities to federal antitrust scrutiny, thereby frustrating implementation of the important state policy of preserving solvency through the regulation of competition. Surely Congress did not intend such an absurd result. In this case, the Ninth Circuit conceded that the business of insurance—at least that of the domestic defendants—was subject to state regulation and, if necessary, could be redressed in a state forum. Its "exempt entities" analysis therefore should be rejected and McCarran's federal-state balance restored.

The Ninth Circuit's myopic interpretation of McCarran cannot be correct. To invalidate long-standing and thought-

fully developed state regulation of established insurance practices shakes the very foundations of federalism, vitiating the principle that McCarran was enacted to protect. At the very least, this Court should review the Ninth Circuit's decision before such an unprecedented change becomes the law of the land.

III. THE NINTH CIRCUIT'S FAILURE TO APPLY THE STATE ACTION DOCTRINE VIOLATED TRADITIONAL FEDERALISM PRINCIPLES

The states' regulatory processes were designed to encourage and in fact depend upon cooperative efforts within the insurance industry. The Ninth Circuit's failure to apply the state action doctrine discourages voluntary participation in those processes by exposing participants to federal antitrust scrutiny. Indeed, the court's decision portends dire consequences for all other state-regulated industries. Unless reviewed by this Court, the opinion will foster uncertainty in the law, among state legislators and officials, and in the business community.

The state action doctrine provides that anticompetitive conduct is immune from federal antitrust liability if it is actively supervised by a state pursuant to a clearly articulated policy. *California Retail Liquor Dealers Ass'n v. Mid-Cal Aluminum, Inc.*, 445 U.S. 97, 106 (1980). The basis of state action immunity is federalism—a notion of deference to state sovereignty in the absence of clear congressional intent to the contrary. *Parker v. Brown*, 317 U.S. 341, 350-51 (1943). The principal focus of a court's inquiry, therefore, must be on expressions of congressional intent.

The Sherman Act reveals that Congress did not intend to penalize state action restraining competition, notwithstanding the federal antitrust policy of free market competition. *Southern Motor Carriers Rate Conf. v. United*

States, 471 U.S. 48, 61 (1985). As the Court observed in *Parker*, "The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state." 317 U.S. at 350-51. Thus, consistent with established federalism principles, the Sherman Act does not compromise a state's ability to regulate the business of insurance or any other domestic commerce.[6]

The district court correctly held that the defendants' collective form-making activity was protected by the state action doctrine. As the court observed, that portion of the defendants' motion for summary judgment based on state action immunity encompassed only "those claims which 'relate to the collective form-making process in those states *that took action* to approve, disapprove or withhold approval of the revised ISO CGL [comprehensive general liability] forms.' " 723 F. Supp. at 479 (emphasis added). In reversing the district court's ruling, the Ninth Circuit erroneously reasoned that "nothing in the affidavit evidence submitted by the defendants shows that the relevant states supervised or approved the boycotts used to produce agreement on the forms." 938 F.2d at 931. State "approval" of collective conduct preceding regulatory decisions, however, should not be regarded as controlling. Instead, active state supervision of private persons in a regulatory process ensures that these persons do not control decisions made by disinterested, politically accountable

[6] McCarran has not displaced state action immunity from federal antitrust liability. As the district court correctly noted, "[I]t would be anomalous to hold that Congress, by adopting the McCarran Act, intended to subject insurance companies to antitrust liability for actions that would be exempt if engaged in by others." *In re Insurance Antitrust Litig.*, 723 F. Supp. 464, 481 (N.D. Cal. 1989), *rev'd*, 938 F.2d 919 (9th Cir. 1991) (citing *Health Care Equal. Comm. v. Iowa Medical Soc'y*, 851 F.2d 1020, 1027 n.10 (8th Cir. 1988)).

public officials. In this case, the plaintiff states' regulators determined at the end of lengthy, fact-intensive investigations that approval of the ISO CGL forms was in the public interest. The Ninth Circuit misapplied the state action doctrine because it ignored the states' active role in this process, failed to recognize that the states ultimately approved or disapproved the forms, and discounted state civil and criminal remedies to redress anticompetitive activities.

The Ninth Circuit's decision has removed the federal antitrust protection upon which all participants in state insurance regulatory processes have relied. If not reversed, the ruling will inhibit the states' ability to regulate the business of insurance. The industry's competitiveness, financial strength and solvency are closely regulated by the states. State regulation is buttressed by companies freely exchanging price data, sharing loss information, and especially participating in reinsurance pools, all under state supervision and pursuant to state law. Private companies and public officials together develop forms, set uniform rates and provide information to consumers. Uncertain as to whether state or federal law governs their activities, insurance and reinsurance companies now will curb, if not abandon, participation in the collaborative processes upon which successful state regulation depends. Without this cooperation, state regulation of the insurance industry will be seriously compromised, and the public good will be subverted.

The Ninth Circuit's erroneous analysis thus has upset the balance between federal and state authority. By subjecting the defendants to federal antitrust liability, the court's ruling deters insurance and reinsurance companies from participating in state regulatory processes. Because state regulation thus has been undermined, the decision vitiates congressional intent and violates federalism principles. *See*

Llewellyn v. Carothers, 765 F.2d 769, 774 (9th Cir. 1985) (Kennedy, J.) ("[T]he Sherman Act was not intended to reach the activities of state governments. [That] immunity springs from an essential principle of federalism, the necessity to respect a sovereign capacity in the several states.") (*citing Hoover v. Ronwin*, 466 U.S. 558, 567-71 (1984)).

The repercussions of the Ninth Circuit's decision extend far beyond the insurance industry. The court's faulty analysis will undermine effective regulation traditionally undertaken by the states in other areas of commerce, *e.g.*, healthcare, communications, transportation, energy, and the sale and distribution of alcohol. As with insurance, active participation by private entities is essential to effective regulation. This Court has recognized consistently that collaboration between the private and public sectors may be accomplished only by shielding participants in the regulatory processes from federal antitrust scrutiny. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499-500 (1988); *see also* Elhauge, *The Scope of Antitrust Process*, 104 Harv. L. Rev. 667, 704 (1991) ("[A]ny process that relies on decision making by disinterested (public) actors who are accountable to the affected interests requires input from those affected (private) interests to function properly.").

In the final analysis, the Ninth Circuit's decision impermissibly creates in the federal courts a "superlegislature" to review state insurance department decisions. As Congress made clear in McCarran, politically accountable state legislators and officials have been allocated this regulatory function. The Ninth Circuit has unnecessarily upset this balance and impaired federalism in the process. Therefore, its decision merits this Court's review.

CONCLUSION

Experienced and knowledgeable state legislatures and officials are best placed to balance competing goals of competition and solvency in the business of insurance. While a truly competitive environment presupposes that some businesses will become insolvent, this risk is unacceptable in the insurance industry. The overriding concern of policyholders is that their insurance companies will be able to meet future claims, because the product of those companies is a promise to pay future losses. As Congress recognized when it adopted McCarran, federal antitrust laws neither were enacted nor did they evolve with this concern in mind. State legislative and regulatory bodies have grappled with this issue for decades, and are best suited to guard against insurance insolvency. Superimposing federal antitrust laws upon the insurance industry and well-established, sophisticated state regulatory systems will throw them into unnecessary turmoil, and does not begin to address the solvency of a business that the states have been charged to protect in the public interest. For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

STEPHEN W. SCHWAB
Counsel of Record
SEYMOUR SIMON
REUBEN A. BERNICK
PETER S. LUBIN
DAVID E. MENDELSOHN
GAIL M. GOERING
RUDNICK & WOLFE
203 North LaSalle Street
Suite 1800
Chicago, Illinois 60601
(312) 368-4000

Counsel for Amicus Curiae

APPENDIX

SUPERVISION OF POLICY FORMS

Alabama:
ALA. CODE §§ 27-14-8(a, b); 27-14-9.

Alaska:
ALASKA STAT. §§ 21.42.120(a, b); 21.42.130.

Arizona:
ARIZ. REV. STAT. ANN. § 20-398(A).

California:
CAL. INS. CODE § 1853.

Colorado:
COLO. REV. STAT. §§ 10-4-418 to 10-4-419(1).

Connecticut:
CONN. GEN. STAT. §§ 38-201c(a), 38-201n(c), 38-370c;
CONN. INS. COMM. bull. no. PF-2(14, 18).

Florida:
FLA. STAT. ANN. §§ 627.410(1, 2) to 627.412.

Illinois:
ILL. REV. STAT. ch. 73, § 755(2);
ILL. ADMIN. CODE tit. 50, §§ 753.20, 753.30(a).

Maryland:
MD. ANN. CODE art. 48A, §§ 242(d)(1), 242(d)(7), 242(f)(3), 376(b).

Massachusetts:
MASS. GEN. LAWS ANN. ch. 175, § 22A.

Michigan:
MICH. COMP. LAWS ANN. § 500.2236(1).

Minnesota:
MINN. STAT. ANN. § 70A.06 subd. 2.

Montana:
MONT. CODE ANN. §§ 33-1-501(1, 2); 33-1-502(1-4).

New Jersey:
N.J. STAT. ANN. §§ 17:29AA-6, 17:29AA-11.

New York:
N.Y. INS. LAW § 3107(b).

Ohio:
OHIO REV. CODE ANN. §§ 3937.03(C)(2), 3937.04(B).

Pennsylvania:
PA. STAT. ANN. tit. 40, § 477b.

Washington:
WASH. REV. CODE ANN. §§ 48.18.100(1, 3); 48.18.110(1)(c).

West Virginia:
W. VA. CODE §§ 33-6-8(a, b); 33-6-9; 33-6-10(b).

Wisconsin:
WIS. STAT. ANN. §§ 631.20(1), 631.20(2)(a-d).

SUPERVISION OF RATING ORGANIZATIONS

Alabama:
ALA. CODE §§ 27-13-60(3-4), 27-13-62, 27-13-66, 27-13-74, 27-13-78 to 27-13-80, 27-14-8(a).

Alaska:
ALASKA STAT. §§ 21.39.060(a, d); 21.39.120(a); 21.42.120(a).

Arizona:
ARIZ. REV. STAT. ANN. §§ 20-161 to 20-166; 20-361(A)(1); 20-365; 20-370(A, B); 20-382; 20-385(A); 20-387(B); 20-397(A, C).

California:
CAL. INS. CODE §§ 1853, 1854, 1857, 1857.1, 1858, 1858.01, 1858.2 to 1858.5.

Colorado:
COLO. REV. STAT. §§ 10-4-403(3), 10-4-403(4), 10-4-404(3), 10-4-408(1)(a), 10-4-408(2), 10-4-413(1), 10-4-414, 10-4-415(k), 10-4-418(1, 2a, 3a, 4a, c-e, 5).

Connecticut:
CONN. GEN. STAT. §§ 38-201(a) to 38-201s.

Florida:
FLA. STAT. ANN. §§ 627.031(1)(d), 627.041(3), 627.221(1)(a), 627.314(1)(b), 627.314(4), 627.318, 627.321(1), 627.371, 627.381.

Illinois:
ILL. REV. STAT. ch. 73, §§ 735A-2(a); 735A-4(1); 735A-5(1); 735A-6(a); 735A-9(1, 2); 735A-12; 735A-13(1); 735A-14; 735A-15; 755(2).
ILL. ADMIN. CODE tit. 50, §§ 752.40(a), 753.10(a, b).

Maryland:
MD. ANN. CODE art. 48A, §§ 242, 242B(1), 242(d)(5), 242(f), 242(g)(1), 242(g)(4), 242(n), 242(q)(1-3).

Massachusetts:
MASS. GEN. LAWS ANN. ch. 175, § 111A; ch. 175A, §§ 6(a, b); 8(a); 14; 18.

Michigan:
MICH. COMP. LAWS ANN. §§ 500.2236; 500.2236(2); 500.2436(1, 2); 500.2446; 500.2468(1); 500.2478; 500.2482(1).

Minnesota:
MINN. STAT. ANN. §§ 70A.03(4, 5); 70A.08 subd. 2; 70A.13 subd. 1; 70A.14 subd. 1(a); 70A.18; 70A.21 subd. 1, 2.

Montana:
MONT. CODE ANN. §§ 33-1-501(1), 33-1-701, 33-16-106(1)(A), 33-16-111, 33-16-206, 33-16-301, 33-16-401(1), 33-16-401(2)(a).

New Jersey:
N.J. STAT. ANN. §§ 17:29A-2, -18, -22, -23; 17:29AA-8, -13.

New York:
N.Y. INS. LAW §§ 2307; 2313(a, b, d(1), g, o); 2321; 2321(a).

Ohio:
OHIO REV. CODE ANN. §§ 3935.04(B); 3935.06(A, D); 3935.11; 3935.14; 3935.16.

Pennsylvania:
PA. STAT. ANN. tit. 40, §§ 1184(b); 1186(a, d); 1189; 1192; 1197(a, b).

Washington:
WASH. REV. CODE ANN. §§ 48.03.010(2), 48.03.030, 48.04.010 to 48.04.020, 48.04.140(1), 48.19.050(1), 48.19.160, 48.19.170(1)(a), 48.19.180(1), 48.19.250(1, 2).

West Virginia:
W. VA. CODE §§ 33-20-4(c); 33-20-6(a, d); 33-20-7(d); 33-20-12(a).

Wisconsin:
WIS. STAT. ANN. §§ 625.31(1), 625.32(1)(a).

UNFAIR TRADE PRACTICES ACTS

Alabama:
ALA. CODE §§ 27-12-1 to 27-12-24.

Alaska:
ALASKA STAT. §§ 21.36.010 to 21.36.350, 21.90.050.

Arizona:
ARIZ. REV. STAT. ANN. §§ 20-105, 20-441 to 20-461.

California:
CAL. INS. CODE §§ 790 to 790.10;
CAL. GOV'T. CODE §§ 11180 to 11181.

Colorado:
COLO. REV. STAT. §§ 10-3-1101 to 10-3-1114.

Connecticut:
CONN. GEN. STAT. §§ 38-60 to 38-64.

Florida:
FLA. STAT. ANN. §§ 120.69, 626.951 to 626.9641.

Illinois:
ILL. REV. STAT. ch. 73, §§ 1013(b, c, d); 1013.1(2, 4, 6, 7); [illegible] 1028 to 1038;
ILL. [illegible]N. CODE tit. 50, § 754.50(a, b).

Maryland:
MD. ANN. CODE art. 48A, §§ 4, 24 to 39, 212 to 234C.

Massachusetts:
MASS. GEN. LAWS ANN. ch. 176D, §§ 1 to 14.

Michigan:
MICH. COMP. LAWS ANN. §§ 500.114, 500.2001 to 500.2093.

Minnesota:
MINN. STAT. ANN. §§ 72A.17 to 72A.32.

Montana:
MONT. CODE ANN. §§ 33-18-101 to 33-18-1005.

New Jersey:
N.J. STAT. ANN. §§ 17:29B-1 to 17:29B-14.

New York:
N.Y. INS. LAW §§ 1101(b)(1)(D), 2401 to 2409.

Ohio:
OHIO REV. CODE ANN. §§ 3901.19 to 3901.22, 3901.221;
OHIO ADMIN. CODE § 3901-1-07-A.

Pennsylvania:
PA. STAT. ANN. tit. 40, §§ 1171.1 to 1171.11.

Washington:
WASH. REV. CODE ANN. §§ 48.04.010(1), 48.30.010 to 48.30.330.

West Virginia:
W. VA. CODE §§ 33-2-11 to 33-2-13, 33-11-1 to 33-11-10.

Wisconsin:
WIS. STAT. ANN. § 628.34.

REGULATION OF REINSURANCE

Alabama:
ALA. CODE §§ 27-3-1(a), -4, -7, -8, -17, -21; 27-5-11(c), -12(a, b, c); 27-27-47, -48; 27-36-3(b); 27-37-1(8).

Alaska:
ALASKA STAT. §§ 21.09.010(a), -.030; 21.12.010, -.020(a); 21.18.040; 21.69.610, -.620.

Arizona:
ARIZ. REV. STAT. ANN. §§ 20-142-152, 20-206(A), 20-260, 20-261, 20-732, 20-734.

California:
CAL. INS. CODE §§ 699, 803, 810, 922.2 to 922.8, 1090.

Colorado:
COLO. REV. STAT. 10-1-111; 10-3-105(1); 10-3-107(1); 10-3-18(3)(4)(5)(6)(a-c, d); 10-3-201; 10-3-207; 10-3-208; 10-3-211(2); 10-3-701; 10-3-702; 10-3-704.

Connecticut:
CONN. GEN. STAT. §§ 38-20, 38-24, 38-25, 38-110, 38-233, 38-452.

Florida:
FLA. STAT. ANN. §§ 624.401(1), 624.404, 624.610(1)(8), 624.610(2)(a-b), 624.610(3), 624.610(5), 624.610(6), 628.481, 628.491.

Illinois:
ILL. REV. STAT. ch. 73, §§ 625, 671, 720 to 725, 733, 785 to 785.5, 786, 786.1.

Maryland:
MD. ANN. CODE art. 48A, §§ 42; 44(1, 5, 48-53, 58); 72(3); 73; 74(1-3); 75(8); 78(2).

Massachusetts:
MASS. GEN. LAWS ANN. ch. 175, §§ 2A, 20, 47(15), 150, 151, 155; ch. 175(b), §§ 3A.

Michigan:
MICH. STAT. ANN. §§ 500.402, -.403(1), -.404, -.405, -.438, -.632, -.636, -.640, -.901(1)(a).
MICH. ADM. CODE r. 500.402.

Minnesota:
MINN. STAT. ANN. §§ 60A.07 subd. 3, 4, 5(a-c)(e); 60A.09 subd. 1, 5(1)(2)(3), 6; 60A.13.

Montana:
MONT. CODE ANN. §§ 33-2-11, -101, -109, -112, -115, -501(8-9), -1205(1-4), -1206, -1211, -1212.

New Jersey:
N.J. STAT. ANN. §§ 17:17-6, 17:17-10, 17:18-5, 17:18-9, 17:23-1.

New York:
N.Y. INS. LAW §§ 307(a)(1); 308; 309(a); 1102; 1114; 1114(a-b); 1115(a); 1301; 1301(a)(11, 14, 15); 1304; 1305; 1305(b)(3); 1308; 4102(c); 4118(a)(1)(A);
11 NYCRR § 86.2; 11 NYCRR pt. 125.

Ohio:
OHIO REV. CODE ANN. §§ 3003.26(c), 3901.07, 3903.26(c), 3905.42, 3925.33, 3929.30, 3929.32, 3929.121, 3941.02.

Pennsylvania:
40 PA. CONS. STAT. §§ 46(a), 382(d)(1), 442(a-b), 442.1, 443, 995.3.

Washington:
WASH. REV. CODE §§ 48.05.030, 48.05.040, 48.12.160(1-4).

West Virginia:
W. VA. CODE §§ 33-3-1, 33-3-2(a), 33-4-15(a-e), 33-5-26, 33-5-27, 33-12-21.

Wisconsin:
WIS. STAT. §§ 631.01(2), 618.11, 618.12, 618.21, 627.33.